

IN THE HIGH COURT OF SIKKIM : GANGTOK

(Civil Appellate Jurisdiction)

R.S.A No. 03 of 2016

Shri Chewang Dorjee Bhutia,
Son of Shri Kunzang Dadul Bhutia,
Resident of Ravangla Bazar, South Sikkim

...Appellant

Versus

1. Smt. Ruth Haleem @ Ruth Karthak Lepcha,
Wife of A. Haleem,
Resident of Chisopani,
P.O & P.S, East Sikkim.
2. The District Collector
Namchi, South Sikkim.
3. The Sub-Divisional Magistrate,
Ravangla, South Sikkim

...Respondents

BEFORE HON'BLE MR. JUSTICE ARUP KUMAR GOSWAMI, CJ.

For Appellant	:	Mr. N.Rai, Senior Advocate. Ms. T.P.Bhutia, Advocate
For Respondent no.1	:	Mr. A. Halim, Constituted Attorney
For Respondent nos.2 & 3	:	Ms. Yeshe W. Rinchen, Government Advocate
Date of hearing	:	14.09.2020
Date of judgment	:	29.09.2020

JUDGMENT

The appellant had filed a suit in the Court of Civil Judge, South Sikkim at Namchi, registered as Title Suit No.04/2007, against the plaintiff of Civil Suit No. 23 of 1980 as defendant no.1 and District Collector, South District, Namchi and Sub-Divisional Magistrate, Ravangla, as defendant nos. 2 and 3, respectively, with the following prayers :

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- "(a) To declare the plaintiff as the rightful owner of the schedule land.
- (b) Impound the Purcha of Defendant No.1 bearing No.32/170 issued in the name of Ruth Karthak Lepcha pertaining to plot no.129, 53/813 and 58/814.
- (c) For a decree cancelling the Parcha Khatyan No.32/170 issued in the name of Ruth Karthak Lepcha.
- (d) Alternatively, to declare that the Plaintiff has acquired right, title & ownership over the schedule land by way of adverse possession against the Plaintiff.
- (e) Pass such other and further order/s as this Hon'ble Court deem fit and proper in the facts and circumstances of the case, in the interests of justice and equity."

2. The schedule of the plaint reads as follows:

SCHEDULE

"All that piece and parcel of immovable property being portions of land bearing Plot/Khasra No.53 & 58 admeasuring 0.6200 & 0.1800 hectares respectively situated in Rabang Block, Ben-Namphrik Elaka, Rabongla, South Sikkim which is butted and bounded as follows:

East: C.F of Ruth Karthak

West: Reserved Forest

North: C.F. of Sherab Bhutia & Cho Lhamu

South: C.F. of Ruth Karthak"

3. The aforesaid suit was transferred to the Court of Civil Judge, Junior Division at Mangan, North Sikkim, wherein the same was registered as Title Suit No. 04 of 2014. The suit was dismissed by the learned Trial Court by judgment and decree dated 30.09.2015. The appeal preferred by the appellant being Title Appeal No.1 of 2015 having been dismissed by the learned District Judge, North Sikkim by judgment and decree dated 09.06.2016, the appellant has filed this Second Appeal.

4. By an order dated 12.04.2017, the Second Appeal was admitted to be heard on the following substantial questions of law:-

"1. Whether the present suit land (a Bhutia land) could be transferred in favour of a Sikkimese woman (the respondent No. 1/defendant No. 1) married to a non-Sikkimese, in view of the following applicable laws of Sikkim, which are protected as old laws under Article 371 (f) of the constitution of India:-

a. Notice of John C. White, Political officer, Sikkim, dated 2nd January 1897.

b. Revenue order no. 1 dated 17th May 1917.

c. Sikkim State General Department Notification no. 660/G of C.E. Dudley, General Secretary to his Highness the Maharaja of Sikkim dated 21st May 1931.

d. Sikkim State Land Revenue Department Notification no. 3082/LR dated 24th March 1954 issued by the Maharaja of Sikkim.

e. Government of Sikkim Land Revenue Department O.O no. 105/LR dated 25th February 1961.

f. Land Revenue Department Notification no. 28/L.R dated 21st April 1969 by which it is clear that the said laws prohibits the transfer of immovable property of a Bhutia in favour of a non Bhutia and whether the previous judgment rendered without examining the effect of the said laws would be binding and the subsequent suit held to be barred Res judicata?

2. *Whether the first Appellate Court was correct in holding that the present suit was barred by Res judicata when the pleadings and documents on record clearly reveal that the Judgment in the previous title suit had been rendered beyond the sale deed by which the Respondent No. 1/Defendant No. 1 who was the Plaintiff in the previous suit had claimed title and further when the said judgment had been obtained by the suppressing the fact that the said suit land had been resold to the original owner, the father in law of the Appellant/ Plaintiff vide agreement dated 06.05.1969 which agreement was found to be not forged or fabricated or manufactured for the purpose of the present suit and further when against the said finding of the learned Trial Court no appeal was preferred by the Respondent No. 1/ Defendant No. 1?*

3. *Whether the Appellant / Plaintiff can be made to suffer a judgment and a decree against the Appellant/Plaintiff due to the mistake or illegality committed by the Trial Court in framing a wrong issue relating to the Appellants plea of adverse possession and rendering a judgment on an issue which was not contested and failing to render a judgment on an issue which ought to have been framed and the first Appellate Court perpetuating the said wrong?*

4. Whether the Judgment dated 09.01.1986 in Civil Suit No. 23 of 1980 could be enforced or executed without a decree having been passed pursuant to the said judgment and Whether the first Appellate Court was correct in holding that in spite of the non execution of the Judgment dated 09.01.1986 by the Respondent no. 1/Defendant no. 1 beyond the period of limitation it could still not be held that of Respondent no. 1/Petitioner no. 1 had waived off her rights?

5. Whether in view of Notification no. 2947/G dated 22 nd November 1946, before shutting out a document from evidence on the ground of non registration and non-validation the Appellant/ Plaintiff who sought to rely upon the said non registered document ought to have been allowed to validate the same by paying the penalty as prescribed after coming to a finding that the said document ought to have been registered by the first Appellate Court even whilst holding that the said document was not a forged and fabricated document?"

5. The case of the appellant in the suit was that he is a son -in - law of Late Mandal Nedup Bhutia, who was the original owner/ title holder of a cardamom field bearing plot no.33 with an area of 6.24 acres and that his father-in-law was stated to have sold a portion of land falling under plot no.33 to defendant no.1, who is his niece, by a Sale Deed dated 07.02.1959. As she was married to one Mr. A. Halim, the transaction was not permissible as per law. After such sale, Mandal Nedup Bhutia remained in possession of the balance portion of the land falling outside the boundary of Sale Deed dated 07.02.1959 and cultivated the same through cultivators till 1967 when he gifted the same to his daughter in the form of "Peezo" and thereafter, he and his

wife (who died in 1996) have been in continuous, unencumbered and uninterrupted possession of the land falling under the plot no.33 by cultivating the same through different cultivators. In paragraph 28, the appellant had also set up an alternative plea of acquiring right, title and interest over the land described in the schedule by way of adverse possession.

6. Further case of the appellant is that in the survey that was conducted in the year 1979-1980, plot no.33 along with other plots were divided into plot nos. 53, 58, 129,130, 393, 57/68 and the same were recorded in the name of his wife, Sonam Gymki Bhutia, vide Parcha Khatiyani dated 25.05.1982. In the year 1969, when the defendant no.1 was externed from Sikkim, she being in need of money had sold the plot of land which she had purchased from Late Mandal Nedup Bhutia back to him at a consideration of Rs. 4,000/- and the transaction was reduced in the form of an Agreement dated 06.05.1969, executed and signed by the defendant no.1. After revocation of the order of externment, the defendant no.1 filed an application for mutation in respect of the purchased land in the year 1979, to which an objection was filed by the appellant and his wife. The Deputy Commissioner, South Sikkim, by his order dated 24.11.1980, observed that parties may approach the appropriate forum in view of there being disputed questions of right and title pertaining to the land in question and accordingly, the defendant no.1 had filed a suit in the Court of learned Civil Judge, Namchi being Civil Suit No.23 of 1980. It is stated that during the pendency of the suit, a Receiver was appointed and he had taken possession of suit land (qualifying the same to be the portion which had been purchased by defendant no.1 in the year 1959 from her uncle late Mandal Nedup Bhutia and resold back to him on 06.05.1969). After the suit was

decreed vide judgment dated 09.01.1986, the learned Court directed the Receiver to hand over the suit land as well as crops to the plaintiff of Civil Suit No.23 of 1980 and the Receiver, by executing a document dated 06.03.1986, handed over possession of the suit land and the crops to the plaintiff of Civil Suit No.23 of 1980. It is pleaded that the plaintiff of Civil Suit No.23 of 1980 (the respondent no.1 herein) took possession of a portion of plot no.33 which was purchased by her without any demur from the Receiver and had raised no dispute with regard to remaining portion of plot no.33.

7. It is further pleaded by the appellant that the plaintiff of Civil Suit No.23 of 1980 (the respondent no.1 herein) had approached the High Court of Sikkim by filing a writ petition being WP(C) No.40 of 2006 and during the pendency of the said writ petition, he, as respondent no.7 the said writ petition, had made a statement that he had no concern with the land of the writ petitioner, which was purchased from Nedup Bhutia in the year 1959. On 02.12.2006, when Parcha issued to the plaintiff of Civil Suit No.23 of 1980 was shown to the Court, it was found that the entire plot no.33 (old) corresponding to Khasra no.129, 53/813, 58/814 had been found to be recorded in the name of the plaintiff of Civil Suit No.23 of 1980 and accordingly, he approached District Collector, South Sikkim on 18.12.2006 raising objection to the issuance of the above Parcha. The District Collector, vide his letter 27.07.2007, intimated that the aggrieved party may approach appropriate forum for redress and accordingly, the suit was filed.

8. In the written statement, the defendant no.1 (plaintiff of Civil Suit No.23 of 1980) had stated that the suit was filed by making false allegations with the ulterior motive of trying to grab the suit land of

which she is the rightful owner in view of the judgment dated 09.01.1986 passed in Civil Suit No.23 of 1980. While referring to the case of the appellant, in sum and substance, it is stated that the issues raised were gone into and decided in Civil Suit No.23 of 1980. However, in specific terms plea of res judicata was not raised. The plea that only part of plot no.33 was sold to her was denied and it is stated that the entire plot no.33 was the subject matter in Civil Suit No.23 of 1980. It is further stated that such a plea was not raised in that suit. It is also stated that the case projected that she had sold back the land purchased by her is in the realm of complete fiction and document dated 06.05.1969 is a fraudulent document.

9. In the written statement, defendant nos.2 and 3 stated that the appellant in the suit filed by him had taken pleas which are contradictory to the stand taken by him in Civil Suit No.23 of 1980.

10. The following issues were framed in the suit:

- "(1) Whether the suit land is an ancestral property of the Plaintiff's wife?*
- (2) Whether the suit land was sold to defendant No1 vide sale deed dated 07.02.1959 and resold back by Defendant No1 to the father-in-law of the Plaintiff?*
- (3) Whether Defendant No.1 has waived off her right to the suit premise by not executing the decree dated 09.1.1986 passed by the Ld Civil Judge South in Civil Suit No 23 of 1980?*
- (4) Whether Defendant No1 can legally acquire any land after marrying Shri A Halim a resident of West Bengal?*

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- (5) *Whether the Defendant No1 has perfected her title over the suit land by virtue of adverse possession?*
- (6) *To what relief(s) is/are the plaintiff entitled?*
- (7) *Whether the suit of the Plaintiff is maintainable?*
- (8) *Whether the suit of the Plaintiff is barred by the principle of Constructive Res judicata and /or Res Judicata?*
- (9) *Whether the suit has been filed by the Plaintiff to frustrate the Judgment/decision of the Court of Ld Civil Judge, South Sikkim, at Namchi dated 09.01.1986 passed in civil suit no 23 of 1980, Smt Ruth Karthak Lepchani v Shri Chewang Dorjee Bhutia and another?*
- (10) *Whether the filing of the present suit is an abuse of the process of the Court?*
- (11) *Whether the document purported to be the alleged agreement dated 06.05.1969 allegedly executed between the Defendant No1 and the father in law of the present plaintiff (filed as P-4 annexed to the plaint) is a forged and fabricated document manufactured for the purpose of this case?*
- (12) *Whether the plaintiff is in possession of the suit land as alleged by him (and if yes, how did he come to possess it)?*
- (13) *Whether the suit is barred by law of limitation?*
- (14) *Whether the suit is bad for mis-joinder of parties?"*

11. Before I proceed any further, it will be apposite to take note of Civil Suit No.23 of 1980 to understand the issues as also the substantial questions of law in their correct perspective. Respondent

no.1 in the present appeal had filed the aforesaid suit against the appellant and his wife in the Court of Civil Judge, South District, Sikkim for declaration of title, restoration of possession and correction of land records in respect of a cardamom field falling under plot no.33, bearing an area of 6.24 acres, situated at Rabongla Basti, South Sikkim. The case of the plaintiff in Civil Suit No.23 of 1980 was that she had purchased the aforesaid plot of land from one Nedup Bhutia @ Sangmu Mandal (since deceased) and the Sale Deed was registered in the year 1959 and she being in continuous possession of the property was enjoying the income accruing from cardamom cultivation till the year 1968. She was arrested by the then Chogyal on charges of sedition in the year 1967 and was lodged in jail till 10.03.1969 and was thereafter externed from Sikkim in May 1969. The said externment order was revoked by notification dated 27.04.1977. During the period of her externment, a number of people grabbed her many properties in Sikkim and the suit land measuring 6.24 acres came to be illegally possessed by the defendants.

12. Civil Suit No.23 of 1980 was contested by the defendants (present appellant and his wife) stating that the suit land was in their continuous possession since the year 1967, when the same was given to the defendant no.2 by her father Nedup Bhutia as a gift. A counter-claim was lodged by the defendants challenging the Sale Deed dated 07.02.1959 on the ground that the Sale Deed was a forged and fabricated document obtained by the plaintiff in collusion with one Passang Tshering Bhutia. The defendants also claimed that they were in adverse possession of the suit land and that the suit was barred by limitation. Stand was taken that plaintiff was married to one A. Halim and as such she had lost her right to acquire landed property within the State of Sikkim.

13. In the said suit, following issues were framed:

- "(i) *Whether the plaintiff purchased the suit land from Nedup Bhutia @Mangam Mondal in the year 1959 under registered sale-deed, if so, whether the same is legal valid and sufficient to confer right, title and interest to the plaintiff over the suit land properties?*
- (ii) *Whether the suit properties was given as gift to the defendants by Nedup Bhutia in the year 1967, if so, whether the same is legal, valid and sufficient to confer right, title and interest to the defendants?*
- (iii) *Whether the suit land is in adverse possession of the defendants?*
- (iv) *Whether the suit is barred by the law of limitation?*
- (v) *Whether the suit is hit by the principle of waiver, estoppels and acquiescence?*
- (vi) *To what other relief or reliefs the parties are entitled to?"*

14. During the pendency of Civil Suit No.23 of 1980, a Receiver, namely, Shri Pando Tsong Kazi was appointed. While 4 witnesses were examined on behalf of the plaintiff, defendant no.1 (appellant herein) had deposed for defendants. Suffice is to say at this juncture that by judgment dated 09.01.1986, the learned Court decreed Civil Suit No.23 of 1980 by deciding all the issues in favour of the plaintiff of the suit. No appeal was preferred by the appellant herein challenging the aforesaid judgment and decree.

15. A notice was issued by the Court to the Receiver on 05.03.1986 to handover the suit land as well as the crop to the plaintiff. The Receiver in terms of the judgment and the notice handed

over the cardamom field covered by plot no.33 and the crop to plaintiff of the said suit on 06.03.1986.

16. It will also be relevant, at this point, to take note of a proceeding initiated by the present respondent no.1 before the High Court of Sikkim, which was registered as WP(C) No. 40 of 2006. While it is not necessary to dilate on the issues raised in the said writ petition, what needs to be noticed is that in the order 30.11.2006, it was recorded that a statement was made by the counsel for the respondent no.7 (the appellant herein) after having consultation with him that he had no concern with the land of the writ petitioner (respondent no.1 herein and plaintiff in Civil Suit No.23 of 1980), which she had purchased from his father- in- law, Late Nedup Bhutia, in 1959. The aforesaid writ petition was disposed of by an order dated 2.12.2006 stating that grievance made by the petitioner had disappeared and that if she had any other grievance, she may move appropriate authorities. The Court also took note of a Parcha Khatian bearing no.32 of 170. While the petitioner therein had sought to contend that the Parcha in question ought to have been handed over in the year 1981, the respondent no.7 (appellant herein) had raised a grievance with regard to the aforesaid Parcha to which this Court observed that he may articulate his grievance, if any, before appropriate authorities.

17. Mr.N.Rai, learned senior counsel for the appellant has submitted that the learned Courts below had committed a grave error of law in holding that the present suit is hit by res judicata . According to him, when decree in Civil Suit No. 23 of 1980 was not executed by the plaintiff of the aforesaid suit, the judgment rendered in Civil Suit No. 23 of 1980 has become non-est in law and therefore, principle

enshrined in res judicata will not be applicable to the suit filed by the appellant. Even otherwise, issues in the present suit cannot be said to be directly or substantially in issue in Civil Suit No. 23 of 1980, he submits. The suit land in the suit filed by the appellant is also not the suit land of Civil Suit No. 23 of 1980. He has contended that judgment rendered in Civil Suit No. 23 of 1980 was obtained by the plaintiff of that suit by suppressing the material fact of her having sold back the property purchased by her to her vendor Nedup Bhutia and besides, the judgment was rendered going beyond the Sale Deed on which the plaintiff of Civil Suit No. 23 of 1980 had rested her claim. He has further submitted that no issue was framed with regard to the plea of adverse possession set up by the appellant as a result of which the appellant is prejudiced. It is his further contention that the appellant was entitled to an opportunity to have the Agreement dated 06.05.1969, which is an unregistered document, validated in terms of Notification No.2947G dated 22.11.1946, but the same was denied to the appellant resulting in miscarriage of justice. Accordingly, he has submitted that IA No.1 of 2016, which is an application praying for validation of Agreement dated 06.05.1969, deserves to be allowed.

18. Mr.A.Halim, the constituted attorney of the respondent no.1 has supported the impugned judgments. It is also submitted that Agreement dated 06.05.1969 is a fraudulent and manufactured document created for the purpose of the case. He contends that in the facts and circumstances of the case no substantial question of law arises in this appeal and the appeal deserves to be dismissed.

19. While supporting the impugned judgments, Ms. Rinchen submits that dispute is primarily between the appellant and respondent no.1.

20. I have considered the submissions advanced and have perused the material on record.

21. In determining the application of the rule of res judicata the court is not concerned with correctness or otherwise of the earlier judgment. A wrong decision by a court having jurisdiction is as much binding as a right one and the same can be over-turned by only taking recourse to appeal or review. The matter in issue, if it is one purely of fact, decided in the earlier proceeding by a competent court must in a subsequent litigation between the same parties be regarded as finally decided and cannot be reopened. A mixed question of law and fact determined in the earlier suit between the same parties cannot also be challenged in a subsequent proceeding. Once a judgment in a former suit attains finality, it binds the parties totally in all issues relating to the subject-matter of the suit or proceeding. In order to sustain a plea of res judicata, it is not necessary that all the parties to the litigation must be common. All that is necessary is that the issue should be between the same parties or between parties under whom they or any of them claim. Explanation IV of Section 11 of Civil Procedure Code, 1908 (for short, CPC) provides that where any matter which might and ought to have been made a ground of defence or attack in the former suit, even if it was not actually set up as a ground of defence or attack, shall be deemed and regarded as having been constructively in issue directly and substantially in the former suit. A party who seeks to raise that kind of plea would be precluded from taking the plea against the same party in a subsequent proceeding which is based on the same cause of action. In other words, even though a particular ground of defence or attack was not actually set up as a ground of defence or attack in an earlier suit, if it was capable of being taken in the earlier suit, it stands as a bar in regard to the said issue being taken in the

subsequent suit on the touchstone of principle of constructive res judicata.

22. The learned Trial Court had taken up issue no.8 at the first instance. While doing so, it also took note of issue no.2. The learned Trial Court held that though the defendant nos.2 and 3 are new parties in the present suit as compared to the former suit, it would not make any difference since the plaintiff in Civil Suit No. 23 of 1980 is the defendant no.1 in the present suit and the issue involved between them is same and that the former judgment made it clear that they are litigating under the same title. It was held that the suit land as described by the appellant is a portion of plot no.53 and 58, which is curved out of plot no.33 and therefore, the suit land involved in the present suit was also the subject matter of the former suit and a finding of fact was recorded that suit property was not different from what it was in the former suit. It was also observed that the learned Court in Civil Suit No. 23 of 1980, on the strength of Sale Deed dated 07.02.1959, had declared title in favour of the plaintiff of Civil Suit No. 23 of 1980 (respondent no.1 herein) over entire plot no.33 and therefore, the suit was barred by res judicata. It was further held that even assuming that division of plot no. 33 had taken place when the earlier suit was decided, then also the issue was constructively in issue. The issue as to whether defendant no.1 (plaintiff of Civil Suit No. 23 of 1980) had sold the land purchased by her vide Sale Deed dated 07.02.1959 back to Mandol Nedup Bhutia vide Agreement dated 06.05.1969, which is one limb of issue no.2, was held to be barred by constructive res judicata on the ground that the plaintiff ought to have raised that issue in Civil Suit No. 23 of 1980 in view of his claim that Agreement dated 06.05.1969 was executed in the year 1969. It was also held that cause of action for filing the suit as highlighted by the

plaintiff is not different from what existed at the time of filing counter-claim and the defence in the former suit. Issue no.2 was, accordingly, decided in the light of the reasoning given in issue no.8.

23. With regard to issue no.1, the learned Trial Court held that apart from the fact that the plaintiff had miserably failed to prove that the suit property was ancestral property, the said plea is also barred by the principles of constructive res judicata as it was implicitly decided in the former suit and the plaintiff ought to have raised or defended the former suit in that respect as well. Issue No.3 was decided holding that the defendant no.1 had not waived the right over the suit land but merely had waived the right to execute the decree over the suit property. As no evidence was led by defendant no.1, it was held in issue no.5 that defendant no.1 does not have title over the suit property by way of adverse possession.

24. In issue No.4, the learned Trial Court held that Married Woman's Property Regulation, 1962, proclaimed by the Maharaja of Sikkim vide notification dated 12.02.1962, on which reliance was placed by the plaintiff, is not applicable to the Sale Deed executed in the year 1959 as the notification did not have retrospective effect. It was further held that though no specific issue was framed on that count in the former suit, yet it was a matter which was constructively in issue in that suit. The learned Court also observed that in issue no.1 of Civil Suit No. 23 of 1980, a clear finding was recorded that the defendants therein (appellant and his wife) had failed to prove that the plaintiff (present defendant no.1) was incapable of acquiring landed properties in Sikkim as she was married to Mr. A. Halim.

25. The suit was held to have been filed to frustrate the judgment dated 09.01.1986 passed in Civil Suit No.23 of 1980 in issue no.9 and

in issue no. 10, it was held that the filing of the suit was an abuse of the process of the court. It was observed that though the plaintiff contended that defendant no.1 took possession only of a portion of land out of 6.24 acres of land, which was the subject matter of Civil Suit No.23 of 1980, from the Receiver appointed in Civil Suit no.23 of 1980, such contention is belied by Exhibit-P6.

26. In issue no.11, it was held that in absence of any evidence led by the defendants, it cannot be said that Exhibit-P4 is a forged, fabricated and manufactured document.

27. While deciding issue no.12, the learned Trial Court examined and evaluated the evidence of the witnesses examined on behalf of the plaintiff as well as maps exhibited by him as Exhibit - P9, P10, P11 and P12. The learned Trial Court did not place any reliance on these Exhibits as well as on the evidence of the witnesses of the plaintiff in view of the infirmities recorded during the course of discussion and it was held that the plaintiff had failed to prove that he possesses the suit property.

28. Issue No.13 and 14 were decided in favour of the plaintiff and in issue no.7, the suit was held to be not maintainable on the ground that suit of the plaintiff is barred by the principle of res judicata.

29. The learned Appellate Court, while deciding issue no.8, observed that in the written statement filed in Civil Suit No.23 of 1980, the appellant as defendant no.1 nowhere stated that Mandol Nedup Bhutia had sold out only a portion of plot no.33 and that he had also not raised any dispute with regard to the boundaries. The learned Appellate Court held that as the appellant raised that issue for the first time in the present suit despite having contested the former suit without taking any such plea in that regard in his written statement

and the counter-claim, the claim of the appellant is barred by constructive res judicata. On the same analogy, the claim of the appellant that the defendant no.1 had sold the same property which was purchased by her back to her vendor was negated. It was also observed that Exhibit-P4, pressed into service by the appellant, being an unregistered document, cannot be relied on in absence of validation under Notification No.2947G dated 22.11.1946. The learned Appellate Court held that judgment in the former suit in connection with plot no.33 comprising an area of 6.24 acres having been delivered by competent Court on being duly contested and the said judgment having not been challenged by the appellant, the decision rendered in the earlier suit attained its finality and cannot be re-opened. In view of decision in issue no. 8 as well as Exhibit-P4 being an unregistered document, the learned Appellate Court decided issue no. 2 against the appellant.

30. While upholding the decision of the learned Trial Court in issue no.1, the learned Appellate Court observed that right, title and interest of the plaintiff in Civil Suit No.23 of 1980 over the suit property had already been determined by the competent Court in the former suit and therefore, in the subsequent suit, the appellant cannot claim the property to be ancestral property.

31. The learned Appellate Court affirmed the view taken by the learned Trial Court in issue nos.3, 6, 7, 9, 10, 12, 13 and 14. Issue nos. 5 and 11 were not pressed by the learned Counsel for the appellant. While affirming issue no.4, the learned Appellate Court held that the said issue is also barred by constructive res judicata in view of the clear finding in issue no.1 of the former judgment that the defendant no.1 (appellant herein) had failed to prove that the plaintiff

of Civil Suit No.23 of 1980 was incapable of acquiring property in Sikkim being married to Mr A. Halim. The learned Appellate Court also observed that the Notification dated 12/10/1962 relating to Married Woman's Property Regulation, 1962, proclaimed by the Maharaja of Sikkim would not be applicable as the said Notification was never implemented and therefore, even otherwise, there was no bar for the defendant no.1 to hold the suit property even if she was married to a non-Sikkimese or non-tribal.

32. So far as substantial question of law no.1 is concerned, it is seen that in issue no.1 of Civil Suit No.23 of 1980, the learned Court had recorded that it could unhesitatingly be held that plaintiff (respondent no.1 herein) had purchased the suit land from Nedup Bhutia in the year 1959 by a registered sale deed conferring right, title and interest on the plaintiff (respondent no.1 herein). Though no specific issue was framed in Civil Suit No.23 of 1980, the learned Court held that the defendants (including appellant herein), though had raised the issue, failed to prove that at the time of transaction of sale of suit land, the plaintiff was incapable of acquiring landed property in Sikkim being married to Mr.A. Halim, a non-tribal. The appellant herein had the opportunity to substantiate the point sought to be canvassed in substantial question of law no.1, but he failed to do so in the former suit. It is also seen that the documents which find mention in substantial question of law no.1 were neither referred to in the pleadings nor argued as is evident from the judgments of the Courts below. In absence of any appeal preferred against the judgment and decree dated 09.01.1986 passed in Civil Suit No.23 of 1980, the findings had attained finality and therefore, it will not be open for the appellant to re-agitate the issue all over again. In view of the above

discussion, in the present factual matrix, substantial question of law no.1 is answered against the appellant.

33. Coming to the substantial question of law no.2, at the outset, it is to be noted that the appellant as plaintiff in the present round of litigation, had introduced a new plea, namely, that there was an Agreement dated 06.05.1969 (referred to as Razinama in the translated version of Exhibit-P4 in the paper book) executed and signed by defendant no.1 (plaintiff of Civil Suit No.23 of 1980) by which the land purchased by the defendant no.1 (plaintiff of Civil Suit No.23 of 1980) had sold back her purchased land to Mandol Nedup Bhutia. The plaintiff in Civil Suit No.23 of 1980 rested her claim on the strength of the Sale Deed dated 07.02.1959. It is to be noticed that in Civil Suit No.23 of 1980 the appellant had taken a stand in his written statement that the suit land was in continuous possession of the defendants since the year 1967 when the same was given to the defendant no.2 (wife of the appellant) by her father Nedup Bhutia as a gift. A counter-claim was lodged by the defendants in Civil Suit No.23 of 1980 challenging the Sale Deed dated 07.02.1959 on the ground that the Sale Deed was a forged and fabricated document which was obtained by the plaintiff in collusion with one Passang Tshering Bhutia. The learned Court in Civil Suit No.23 of 1980 in issue no.2 had held that there was no gift in favour of the defendants, who were minors in the year 1967, and had categorically declared title in favour of the plaintiff of Civil Suit No.23 of 1980 in respect of suit land covered by plot no.33 measuring 6.24 acres. It is also relevant to note that the appellant himself in paragraph 2 of the plaint had stated that plot no.33 has an area of 6.24 acres. Therefore, submission of Mr. Rai that Nadup Bhutia had sold only a portion of plot no.33 and that suit land in

the suit filed by the appellant is different from the suit land in Civil Suit No.23 of 1980 has no merit.

34. As noticed earlier, the appellant did not prefer any appeal against the said judgment and decree dated 09.01.1986. As such, it will not be open for the appellant to contend by filing a fresh suit that the judgment rendered in Civil Suit No.23 of 1980 was faulty and not correct as the same was, according to him, rendered going beyond the Sale Deed and that, therefore, principle of res judicata will not be attracted. The argument that the plaintiff in Civil Suit No.23 of 1980 had suppressed the fact that the suit land was resold to the original owner i.e. father- in- law of the appellant by the plaintiff of Civil Suit No.23 of 1980 by an Agreement dated 06.05.1969 and therefore, principle of res judicata is not applicable, has no merit. If the Agreement dated 06.05.1969 was suppressed by the plaintiff of Civil Suit No.23 of 1980, it should have been pleaded accordingly by the appellant in Civil Suit No.23 of 1980. It was also not pleaded by the appellant in the present suit that he was not aware of Agreement dated 06.05.1969 earlier. It is worth remembering that in Civil Suit No.23 of 1980 the appellant herein had, on the contrary, questioned the Sale Deed dated 07.02.1959 to be a forged, fabricated and manufactured document and had claimed the suit land on the basis of a gift. Even when WP(C) NO.48 of 2006 came to be disposed of on 13.11.2006, i.e, about 5 months before the suit was filed by the appellant on 26.04.2007, the appellant had not raised the issue of the Agreement dated 06.05.1969 and had submitted before the Court that he had no concern with the land purchased by the plaintiff of Civil Suit No.23 of 1980. In view of the above discussion, substantial question of law no.2 is answered against the appellant.

35. After the decision in substantial question no.2, there should not have really been any occasion for further discussion on Agreement dated 06.05.1969. However, in view of substantial question of law no.5, it will be appropriate to discuss the question posed. The aforesaid Agreement dated 06.05.1969, which the appellant claims to be a Sale Deed, is not a registered document. The learned Appellate Court observed that Agreement dated 06.05.1969 (Exhibit P-4) being an unregistered document, the same cannot be relied on in absence of validation under Notification 2947G dated 22.11.1946. It is in view of the aforesaid observation of the learned Appellate Court substantial question of law no.5 has arisen to consider as to whether because of Notification No.2947G dated 22.11.1946, opportunity should have been granted to the appellant to validate the Agreement dated 06.05.1969 (Exhibit -P4) by paying the penalty as prescribed. It is in that light an application being I.A No.01/2016 was filed by the appellant praying for validation of the Agreement dated 06.05.1969 on payment of penalty in terms of Notification No.2947G dated 02.11.1946. I.A No.01/2016 is required to be considered while hearing the appeal.

36. Notification No.2947G dated 22.11.1946 was issued amending Para 2 of Notification No.385/G dated 11.04.1928. I shall proceed on the assumption that the aforesaid Notifications still hold the field. It will be appropriate to reproduce the relevant portion of the aforesaid Notifications herein below:

"Notification No.385/G

Any document such as mortgage and sale deeds and other documents, and deeds, etc. will not be considered valid unless they are duly registered.

R.S.A No.03 of 2016
(Chewang Dorjee Bhutia vs. Ruth Haleem & Ors.)

The contents of unregistered document (which ought in the opinion of the Court to have been registered) may be provided in Court but a penalty up to 50 times the usual registration fee shall be charged.

Exception:- Hand notes duly stamped shall be exempt from registration penalty.

By order of His Highness the Maharaja of Sikkim

Gangtok The 11th April, 1928"

XXXXXXXXXXXXXXXXXXXXX

"Notification No:2947 G

Amendment of para 2 of Notification No: 385/G dated 11.04.1928

An unregistered document (which ought in the opinion of the Court to have been registered) may however, be validated and admitted in Court to prove title or order matters contained in the document on payment of penalty up to fifty times the usual registration fee.

Issued by order of H. H. the Maharaja of Sikkim

Gangtok The 22nd Nov., 46"

37. The Notification No.2947G, by using the expression "may", gives a discretionary power on the Court to validate and admit an unregistered document which was required to be registered. It is not an automatic formality that the Court has to invariably grant liberty to validate such an unregistered document and have it admitted in the Court without any consideration to the attending facts and circumstances.

38. By the time Notification No.2947G dated 22.11.1946 was issued, Sikkim State Rules Registration of Documents, 1930 (for short, Rules of 1930) had come into force and the aforesaid Rules of 1930 was also noted in the Notification No.2947G. Rule 21 of Rules of 1930 provides that a document required to be registered shall be presented either by the person executing it or by the person claiming under it. The Notifications dated 11.04.1928 and 22.11.1946 make it clear that an unregistered Sale Deed shall not be considered valid unless validated. Rule 24 provides that no document relating to immovable property shall be accepted for registration unless it contains a description of the property sufficient to identify the same. Translated version of Exhibit-P4 reads as follows:

"Razinama

I, Ruth Karthak Lepchani, Resident of Singtam Bazar do hereby execute this Razinama Kajas on this day 6.5.69 to my maternal Uncle Mondol Nedup, Resident of Sangmoo Village, that I am handling over back to my maternal uncle the cardamom field of Rabong having received the consideration value of rupees 4,000/- (in word four thousand) which he had once given to me in the past for Rupees 3,000/- (in word three thousand) as I am required to leave Sikkim.

In the event of my coming back to Sikkim I will take back the cardamom field after giving back the said amount of Rupees 4000/- (In word four thousand).

In case if I am not able to come the Government can transfer the cardamom field in the name of my maternal uncle Mondal Nedup on the strength of this document to which I shall have no

claim or objection whatsoever. I have signed this document of my own free will and volition.

Sd/-

Ruth Karthak Lepchani

6.5.69"

39. A reading of Exhibit-P4 goes to show that the document contains no description of the property. A document presented for registration must be self-contained and therefore, under Rule 24 of the Rules of 1930, the Agreement dated 06.05.1969, even if had been presented before the Registering Authority, could not have been accepted for registration. Exhibit-P4 also recites that transfer may be effected by the Government only in the event of the executant of the document being not able to come back to Sikkim and it is an admitted fact that the alleged executant had come back to Sikkim. The defendant no.1 in Title Suit No.04 of 2014 (plaintiff of Civil Suit No. 23 of 1980) had stated that the appellant had taken recourse to falsehood in respect of Agreement dated 06.05.1969 and that the document is a fraudulent document. It was not the case of the appellant that the land sold by Nedup Bhutia was again possessed by him at any point of time. While it was the case of the appellant in Civil Suit No.23 of 1980 that he along with his wife were in possession of the suit land (plot no.33) since 1967 on the strength of a gift made by Nedup Bhutia, in the present suit the appellant had asserted that gift was made by Nedup Bhutia to his daughter in respect of remaining portion of plot no.33 and they were in possession of the same. At the cost of repetition, it is to be noted that the learned Court, while deciding Civil Suit No.23 of 1980, had recorded a finding that the defendants had failed to prove any gift in their favour, and had decreed Civil Suit

No.23 of 1980 declaring title of the plaintiff of the said suit in respect of suit land measuring 6.24 acres covered by plot no.33.

40. In view of the above discussion, I find that no case is made out to permit validation of Agreement dated 06.05.1969 after 51 years of its alleged execution. Accordingly, I.A No.01/2016 is dismissed. In the light of the above discussion, substantial question of law no.5 is also answered against the appellant.

41. For the sake of convenience, I will now take up substantial question of law no.4. A notice was issued by the Court to the Receiver on 05.03.1986 to handover the suit land as well as the crops to the plaintiff of Civil Suit No.23 of 1980. The Receiver, in terms of the judgment rendered in Civil Suit No.23 of 1980 and the notice, handed over the cardamom field covered by plot no.33 and the crops to the plaintiff of the said suit on 06.03.1986. In view of the Receiver handing over the suit land, the plaintiff of Civil Suit No.23 of 1980 obtained possession of the suit land. When the judgment was satisfied in this manner it cannot be said that the respondent no.1 had waived her right to get the fruit of the judgment. The appellant had neither challenged the notice issued by the Court on 05.03.1986 nor the action of the Receiver handing over the suit land to the plaintiff of Civil Suit No.23 of 1980. Mr. Rai had submitted that because execution of the decree had not taken place in accordance with law, judgment dated 09.01.1986 has become non-est in law and therefore, the suit filed by the appellant cannot be held to be barred by the principle of res judicata. Under Article 136 of the Limitation Act, 1963, the period of limitation for execution of a decree other than a decree granting a mandatory injunction or order of any civil court is twelve years. That does not mean that findings recorded in the judgment are obliterated

or that the judgment ceases to be a judgment in the eye of law. Accordingly, substantial question of law no.4 is decided against the appellant.

42. I will now take up substantial question of law no.3. The defendant no.1 (plaintiff of Civil Suit No.23 of 1980) in the suit filed by the appellant had not set up a plea of perfecting her title over the suit land by virtue of adverse possession. However, the issue no.5 was as to whether the defendant no.1 had perfected her title over the suit land by virtue of adverse possession. The appellant had set up a plea of adverse possession but admittedly no issue was framed on that account and in that context, substantial question of law no.3 was formulated. Mr.Rai had submitted that because of non-framing of issue relating to adverse possession, the appellant is seriously prejudiced and the same had vitiated the proceedings. It is apparent that issue no.5 should have really referred to plaintiff instead of defendant no.1, but the same was not pointed out to the learned Trial Court by any of the parties. There is, however, another issue, namely, issue no.12, which is to the effect as to whether the plaintiff was in possession of the suit land as alleged by him and if yes, how did he come to possess it. So, the question of possession of the plaintiff over the suit land was very much an issue in the suit. It is apparent that the parties went to trial fully knowing the rival case. The learned Trial Court, on the basis of evidence and materials on record, had recorded a finding of fact that the plaintiff had failed to prove his possession over the suit property, which was also affirmed by the learned Appellate Court.

43. To establish a plea of adverse possession, the person who claims adverse possession is required to establish on what day he came into possession, what was the nature of the possession, whether

the factum of possession was known to other party, how long his possession has continued and his possession was open and undisturbed. When the appellant has even failed to establish his possession, question of his possessing the suit land by way of adverse possession cannot arise. In the present fact situation, it cannot be said that absence of an issue regarding plea of adverse possession set up by the appellant is fatal to the case or that the same had vitiated the proceedings. It is to be noted that in Civil Suit No. 23 of 1980 also, the court had rejected the plea of adverse possession set up by the appellant. In view of the above discussion, substantial question of law no.4 is answered against the appellant.

44. In view of what has been discussed above, I find no merit in this appeal and accordingly, same is dismissed.

45. Lower Court records be sent back.

Chief Justice

Avi